United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1314

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

CHARLES EDWARD MORRISON,

Appellant.

Docket No. 77-1314

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P/S

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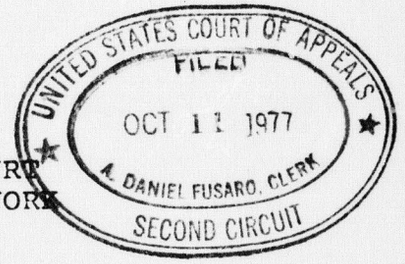
CHARLES EDWARD MORRISON



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
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BRIEF FOR APPELLANT CHARLES EDWARD MORRISON

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the evidence was insufficient to establish, beyond a reasonable doubt, that appellant Morrison was the drug seller, where the description of the drug seller was incompatible with Mr. Morrison's appearance.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Robert J. Ward) entered on July 21, 1977, convicting appellant Charles Edward Morrison, after a jury trial, of the distribution and possession with intent to distribute 62.98 grams of cocaine (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A)). Appellant's sentence was suspended and he was placed on probation for a period of three years.

By order of this Court, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Charles Edward Morrison was charged in a one count indictment with the distribution and possession with intent to distribute 62.98 grams of cocaine. In the transaction in question, Mr. Morrison was alleged to have sold the cocaine for $2,200 to an undercover DEA agent, Robert Baker, in the presence of the informant, Johnny Burton, who made the necessary introductions. Mr. Morrison was arrested nineteen months after the sale occurred, and the thrust of the defense was that Mr. Morrison had been misidentified as the drug seller "Chuck."

Agent Baker testified that on September 11, 1975, accompanied by Johnny Burton, he entered the Joy Social Club on 132nd Street in Manhattan. Burton introduced the agent to a man named Chuck; Chuck and Burton went outside for a few minutes, and when they returned, the three entered a rear room in the club. Chuck produced a tinfoil packet, opened it, and showed the purchasers approximately two ounces of cocaine. The two ounces were sold to Agent Baker for $2,200. Agent Baker and Burton left the club and walked to 130th Street, where they met Special Agent Thomas King (T64-74).* Two months later, Agent Baker returned to the Joy Social Club in an effort to locate Chuck. He returned about six or seven times thereafter, looking for Chuck. Baker's quest was unsuccessful and he never again saw Chuck.

In April of 1977, Mr. Morrison, after he apparently answered to the name Chuck, was arrested by two agents at a different social club and was subsequently identified by Agent Baker as the man who had sold him the cocaine (T75-77).** This identification by Agent Baker occurred more than nineteen months after his single exposure, inside the bar, to the drug seller Chuck. Agent Baker, in his report prepared following the sale, described

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*References to the pages of the transcript are shown as numbers preceded by "T".

**At this time, Chuck had not been identified as Charles Edward Morrison, but had been tentatively identified as John C. Brown (T105-107).

Chuck as five feet, ten inches tall, weighing 220 pounds, of West Indian extraction, and having a receding hairline (94-95). Though he affirmed in court that Mr. Morrison was Chuck, the arrest report described Mr. Morrison as being five feet, eight inches tall, weighing 180 pounds, and as being a Negro from North Carolina with black hair (H201). Agent Baker testified that Chuck had side burns and a goatee, as did Mr. Morrison, but that information, as well as an approximation of Chuck's age, did not appear in any of the agent's reports (T95-96).

Johnny Burton, a Government informant, provided the only other identification testimony. He stated that he recognized Mr. Morrison to be Chuck (T122). Prior to the transaction in issue, Burton had seen Chuck fourteen or fifteen times; nine or ten of those were chance meetings at one of the social clubs he frequented, and five or six were meetings involving narcotics transactions (T123). Burton testified that, on September 11, 1975, he introduced Agent Baker to Chuck, stating that the agent was his cousin who was interested in purchasing two ounces of cocaine, and the transaction was completed as detailed in Agent Baker's testimony (T124-129).

Burton's credibility was seriously undermined by his excessive criminal record, partially elicited on direct examination and fully explored on cross. Burton had been recruited by DEA Agent Horn in 1974 after he had been arrested for selling heroin and was being held on $75,000 bail. Upon agreeing to act as a Government agent, his bail was lowered to $25,000,

which he made by paying the cash alternative; additionally, his original sentence of fourteen years was modified (apparently pursuant to a motion under F.R.Crim.Proc. 35(b)) to five years probation. Burton admitted having altered serial numbers on an automobile, possessing stolen property on several occasions, selling heroin at various times, using a stolen credit card, obtaining money by false pretenses, and other crimes. He denied having committed a rape, attempting to cash a forged check, and passing bad checks, crimes charged to him but which were apparently not sustained (T134-150). Burton also had a number of pending cases involving the possession of stolen property and stolen credit cards, uttering forged instruments, and embezzlement, all within a few months of the instant trial; on all these matters, Burton asserted his Fifth Amendment privilege (T150-152).

Burton's integrity as a witness was also attacked by reference to the various considerations and financial rewards he had obtained from the Government in exchange for his assistance. DEA paid him $150 per week as an informant, and he additionally was permitted to keep about half of the more than $12,000 in funds which, in part, were used to purchase contraband (T115, 153-156). Burton had received $225 (plus a witness fee) for his work in this case (T170). The reduction of his sentence for selling heroin from fourteen years prison to five years probation, along with the substantial reduction of his bail, noted above, was the initial assistance he received for becoming an

informant, but similar additional benefits appear to have been extended. In one case involving a stolen credit card, Burton was sentenced to one year probation; he denied that DEA assisted him and stated that the sentence was not a special consideration despite his fourteen prior arrests (T146). Another case involving the stealing of money by false pretenses -- which Burton admitted -- was dismissed after he made restitution (T147-148), and Burton's status as a parolee (since 1974) had never been questioned despite the numerous criminal incidents in which he had been involved while on parole (T159-160).*

Agent Thomas King drove Baker and Burton to and from the Joy Social Club on the date of the transaction, and later took possession of the cocaine which had been purchased (T173-176). This witness testified that he had seen Chuck standing in front of the Joy Social Club on the date of the sale, but he offered no testimony that he recognized that person and Mr. Morrison to be one in the same (T174). Agent King also assisted in the efforts to arrest the suspect Chuck, but on the approximately nine occasions on which he and Agent Baker returned to the vicinity of the Joy Social Club, they were unsuccessful (T177-178). Agent Richard Holmes was the officer who arrested Mr. Morrison. On April 15, 1977, armed with an arrest warrant, he went to a different social club in the same neighborhood and

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*Additional facts pertinent to Burton's honesty appear on the record; they have not been included here in the interest of brevity.

asked the door guard for Chuck; Mr. Morrison appeared at the door shortly thereafter, acknowledged he was called Chuck, and was arrested (T204). Agent King conducted the post-arrest interrogation of Mr. Morrison, but he did not suggest that he had recognized the prisoner to be Chuck on the basis of his viewing some nineteen months earlier (T182-183).*

After deliberation, the jury returned a verdict of guilty (T.293).** Nevertheless, Mr. Morrison maintained his innocence, under close examination by the trial judge:

> THE DEFENDANT: Your Honor, I am nervous. I can hardly talk. I am innocent. That is all I can say.
>
> THE COURT: You know, I could sentence you to 15 years in Federal prison on the charge on which you stand convicted. You know that, don't you?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Is it your word to me that back in 1975 you did not sell any cocaine to Mr. Baker? Is that your word to me?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Said as a man?

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*It was during Agent King's testimony that the initial identification of Chuck as one John C. Brown was explained. Chuck had been reported by the informant to have been driving a certain Cadillac whose license plate was traced to a John C. Brown; Mr. Morrison, in King's interrogation, indicated that he had a cousin who had purchased the car from Mr. Brown without having changed the registration (T183-184).

**At the conclusion of the evidence, counsel moved for a directed verdict of acquittal; the motion was denied (T213-214). After the verdict of guilty was returned, counsel moved to set aside the verdict as against the weight of the evidence; the court denied this application, noting that the case "could have gone either way" (T294).

THE DEFENDANT: As a man.

THE COURT: That is your statement?

THE DEFENDANT: That is my statement.

(T311)

At the sentencing proceeding it was shown that Mr. Morrison, 38 years old, had but one prior conviction involving possession of marijuana and had both a good employment record (although he had also run numbers) and a stable common-law marriage (T308). The court suspended sentence and placed Mr. Morrison on probation for three years (T315).

ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH, BEYOND A REASONABLE DOUBT, THAT APPELLANT MORRISON WAS THE DRUG SELLER, WHERE THE DESCRIPTION OF THE DRUG SELLER WAS INCOMPATIBLE WITH MR. MORRISON'S APPEARANCE.

The evidence produced by the Government as to the description of the drug seller and the appearance of appellant Morrison is so thoroughly inconsistent as to constitute a failure to prove appellant's guilt beyond a reasonable doubt. The discrepancy was so revealing and went to so essential an issue that a reasonable mind would necessarily entertain a serious doubt of guilt. Cf. United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972)(Friendly, C.J., citing Curley v. United States, 160 F.2d 229, 232-233 (D.C. Cir.), cert. denied, 331 U.S. 837 (1947)).

The individual who sold drugs was said, by Agent Baker, to be West Indian, and the agent noted that his speech distinguished him as such; Mr. Morrison, by contrast, is an American Negro from North Carolina. The drug seller had a receding hairline, while Mr. Morrison has a full head of black hair; and Agent Baker's report prepared following the sale made no mention of the side burns and goatee worn by Mr. Morrison.* Nor did the physical build of the drug seller match Mr. Morrison's

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*Agent Baker testified that notwithstanding the failure to include these descriptive features in his report, the drug seller wore side burns and a goatee.

appearance: the drug seller, at five feet, ten inches and 220 pounds, was considerably heftier than Mr. Morrison, who was five feet, eight inches, and 180 pounds.

No reasonable mind can eliminate the substantial possibility that the drug seller and Mr. Morrison are different persons, for Agent Baker's testimony virtually proves that it could not have been Mr. Morrison who sold the cocaine. Nor does the other evidence presented by the Government overcome this defect in the proof of identity. Agent Baker's testimony identifying Mr. Morrison as the drug seller is unconvincing in light of his own description of that individual. Moreover, there need be no question as to Agent Baker's honesty; he viewed Mr. Morrison after a nineteen month hiatus between the transaction and arrest, and this identification was effected as a post-arrest show-up, circumstances which encouraged a mistaken identification. Informant Burton's identification of Mr. Morrison was equally unconvincing, for his desire to please his Government benefactors and his demonstrably dishonest character rendered his identification no more than a rubber-stamp. It was Charles Morrison's misfortune to be nicknamed Chuck, for when the Government agents, after a fruitless and frustrating nineteen month search, were seeking a Chuck to arrest, he happened to be around. But it bears noting that Chuck is a common enough nickname to belong to two people who frequented different social clubs, and the evidence suggests not that Mr. Morrison was the Chuck being sought but that there was another Chuck, a West

Indian with a receding hairline.

As in the case when the Government's identification testimony proves only a "resemblance" to the criminal perpetrator (e.g., United States v. Luck, 447 F.2d 1333, 1337 (6th Cir. 1971); Hendrix v. United States, 327 F.2d 971, 974 (5th Cir. 1964)), or where the Government's identification witness is "unsure" (e.g., United States v. Musquiz, 445 F.2d 963, 965 (5th Cir. 1971); United States v. Johnson, 427 F.2d 957, 961 (5th Cir. 1970)), identification evidence that reveals a significant discrepancy between the appearance of a defendant and a detailed and written description of the actual perpetrator cannot support a conviction. Because there must be a substantial doubt that Mr. Morrison was properly identified, arising from the Government's own description of the person who sold drugs, the evidence below was insufficient to establish guilt beyond a reasonable doubt.

CONCLUSION

For the above-stated reasons, the judgment should be vacated and the indictment dismissed.

Respectfully submitted,

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October 11, 1977

CERTIFICATE OF SERVICE

October 11, 1977

I certify that a copy of this brief [redacted] has been mailed to the United States Attorney for the Southern District of New York.

Steven Floyd Barnett